

MICHAEL J. SHEPARD (SBN 91281)
mshepard@kslaw.com
KING & SPALDING LLP
50 California Street, Suite 3300
San Francisco, California 94111
Telephone: +1 415 318 1221

KERRIE C. DENT (admitted *pro hac vice*)
kdent@kslaw.com
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW, Suite 900
Washington, DC 20006-4707
Telephone: +1 202 626 2394

CINDY A. DIAMOND (SBN 124995)
cindy@cadiamond.com
ATTORNEY AT LAW
58 West Portal Ave #350
San Francisco, CA 94127
Telephone: +1 408 981 6307

Attorneys for Defendant
ROWLAND MARCUS ANDRADE

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

UNITED STATES OF AMERICA,
Plaintiff,
v.
ROWLAND MARCUS ANDRAD
Defendant.

Case No. 3:20-cr-00249-RS

**DEFENDANT ANDRADE'S BRIEF
REGARDING ADMISSION OF DEFENSE
EXHIBIT 3202**

Judge: Hon. Richard Seeborg, Chief Judge

Mr. Andrade appreciates the opportunity to brief the question of the admissibility of Defense Exhibit 3202, which was authenticated during the testimony of Special Agent Ablett, but which the Court excluded based on a hearsay objection by the government. For the reasons set

1 forth below, the Court's ruling is contrary to settled law and Def. Ex. 3202 should be admitted.

2 Def. Ex. 3202 contains an email forwarded to Mr. Andrade that provided him an update
 3 on the development of AML Bitcoin's biometric identification technology. This email, and others
 4 like it, are central to Mr. Andrade's defense, as Mr. Andrade's belief about the progress of the
 5 development of AML Bitcoin's technology is a critical element of his defense, as established by
 6 the information he had received. As the Court has heard, one of the government's core
 7 accusations is that AML Bitcoin lacked the technology that it (according to the government) was
 8 claiming to have, and that Mr. Andrade had no reason to believe the technology would be
 9 completed anytime soon. As Mr. Ward said in opening, "The technology didn't work . . .and, you
 10 know, Marcus Andrade's cryptocurrency, AML Bitcoin, it was never what he said it was."
 11 Transcript of Jury Trial Proceedings, 2-11-2025, 202:25-206:3. This theme of the lack of
 12 technology and progress in technology development has featured heavily in the government's
 13 presentation of its case.¹

14 During this trial, the Court has permitted introduction of evidence offered by the
 15 government that would have been hearsay had it been offered for the truth of the matter asserted,
 16 but that was admitted for the impact of the statement on the listener. What has been introduced
 17 includes evidence the government seeks to use to show that Mr. Andrade was aware of facts
 18 purportedly alerting him to problems with his business and its technology, even where there was
 19 no evidence of him taking direct steps in response to the out-of-court statements.² In introducing

20
 21 ¹ See e.g. Transcript, 2-18-25, 986:8-19 (Government counsel inquired of Ms. Bernadette Tran
 22 what Mr. Andrade said about AML Bitcoin ^{milestones} and how frequently he said things like, "It's
 23 coming soon."); Transcript, 2-13-2025, 627:10-14 (Government counsel inquires of Dr. Rene
 24 Acuna his understanding of whether AtenCoin technology was finalized, to which he responded
 25 his understanding it was in the process of being finalized); Transcript, 2-20-2025, 1412:9-13
 26 (Government counsel elicited Mr. Hung Tran's guess that at the time he visited the Cross Verify
 27 team in London, they were 9 to 12 months away from being able to sell the product).

28 ² See Transcript, 2-18-2025 at 1025:22-1026:13 (The government was permitted to introduce Ms.
 29 Tran's out-of-court statements to Mr. Andrade regarding negative comments about AML Bitcoin
 30 on a Telegram chat, despite Mr. Andrade not reacting to or taking any steps regarding Ms. Tran's
 31 statements to her about the chats); Transcript, 2-20-2025 at 1329:21-1333:8 (The government was
 32 permitted to introduce Exhibit 221, an email to Mr. Andrade regarding overdue payment, over
 33 Defense hearsay objection, despite Mr. Andrade not having responded to the email directly and
 34 despite lack of evidence of any steps taken directly pursuant to that email).

1 evidence like Def. Exhibit 3202, the Defense is seeking to achieve the opposite effect through the
 2 same means by providing evidence that tends to demonstrate that Mr. Andrade was told things
 3 about the development of his technology that would reasonably inform him of the legitimacy of
 4 his representations about it.

5 Mr. Naimer was in charge of the development of that technology, and his email in Def.
 6 Ex. 3302 provides important evidence showing Mr. Andrade did have a reasonable belief that the
 7 technology was progressing as predicted: Mr. Naimer wrote that “the product is developing nicely
 8 and on time.” Needless to say, Mr. Andrade’s intent in making statements the government
 9 attributes to him about the AML Bitcoin technology is a “critical element” of the wire fraud
 10 charge in Count One. *See, e.g., United States v. Henny*, 527 F.2d 479, 484 (9th Cir. 1975) (intent
 11 is a “critical element[]” of wire fraud); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437
 12 (1978) (“[T]raditional legal concepts . . . render intent a critical factor”). Without the requisite
 13 intent, there can be no crime. *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (“wrongdoing
 14 must be conscious to be criminal”) (quoting *Morissette v. United States*, 342 U.S. 246, 252
 15 (1952)).

16 Admission of Def. Ex. 3202 falls easily within the principle that “an out-of-court
 17 statement is *not* hearsay if offered for any purpose other than the truth of whatever the statement
 18 asserts.” *United States v. Lopez*, 913 F.3d 807, 826 (9th Cir. 2019); *United States v. Lin*, No. 15-
 19 cr-00065-BLF-1, 2018 U.S. Dist. LEXIS 68194, *17 (N.D. Cal. April 23, 2018); VI Wigmore on
 20 Evidence (3d edition), section 1789, at 235 (“Whenever an utterance is offered to evidence the
 21 state of mind which ensued in another person in consequence of the utterance, it is obvious that
 22 no assertive or testimonial use is sought to be made of it, and the utterance is therefore
 23 admissible, so far as the Hearsay rule is concerned”); 2 McCormick on Evidence § 249 (7th ed.
 24 2016) (providing examples); *see People v. Roberson*, 167 Cal.App.2d 429, 431 (1959) (finding
 25 reversible error in failing to admit a statement made to the defendant that the person who later
 26 sold him drugs was an undercover police officer; court determined this evidence should have
 27 been admitted to corroborate the defendant’s state of mind and his testimony that he would not
 28

1 have sold drugs to that person).

2 There is no question that this principle applies to statements impacting the defendant's state
 3 of mind. *See, e.g., United States v. Lin*, No. 15-cr-00065-BLF-1, 2018 U.S. Dist. LEXIS 68194,
 4 *17 (N.D. Cal. April 23, 2018); *United States v. Corona*, 41 F. App'x 33, 33 (9th Cir. 2002). Nor
 5 is there any question that that this principle applies to evidence offered by the defendant. *See id*
 6 (reversing conviction due to exclusion of statements offered by defendant that were "probative on
 7 the issue of government inducement, not for the truth of the out-of-court statements but to show the
 8 effect they had on Corona's state of mind"); *United States v. Sanchez-Estrada*, 394 F. App'x 428,
 9 429 (9th Cir. 2010) (finding error, determined to be harmless, in excluding statement offered by
 10 defendant showing that he was seeking out official restraint by calling the federal agent over to him
 11 and starting a discussion). Equally beyond question is that Def. Ex. 3202 is relevant: it "has any
 12 tendency to make a fact [here Mr. Andrade's intent to deceive or cheat] more or less probable than
 13 it would be without the evidence . . . [and] the fact is of consequence in determining the action."
 14 Fed. R. Evid. 401. The erroneous exclusion of non-hearsay testimony requires reversal where its
 15 exclusion is prejudicial, *Wagner v. Cnty. of Maricopa*, 747 F.3d 1048, 1052 (9th Cir. 2013), as it
 16 would be in this case, given that Def. Ex. 3202 provides exculpatory evidence on a central
 17 government allegation and is key to Mr. Andrade's defense. *See also Sherman v. Gittere*, 92 F.4th
 18 868, 878-879 (9th Cir. 2024) ("The constitutional right to 'a meaningful opportunity to present a
 19 complete defense' is rooted in both the Due Process Clause and the Sixth Amendment").

20 Respectfully submitted,

21
 22 Dated: February 24, 2025

KING & SPALDING LLP

23
 24 By: /s/ Michael J. Shepard
 25 MICHAEL J. SHEPARD
 26 KERRIE C. DENT
 27 CINDY A. DIAMOND

28
 29 Attorneys for Defendant
 30 ROWLAND MARCUS ANDRADE